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No. 04-44

IN THE
Supreme Court of the United States

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY,
Petitioner,

v.

THOMAS RAMSEY,
Respondent.

On Petition for a Writ of Certiorari to the Missouri Court of Appeals

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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July 29, 2004

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MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Association of American Railroads (AAR) respectfully moves for permission to file the attached brief *amicus curiae*. This motion is filed under Rule 37.2(b). Petitioner, Burlington Northern And Santa Fe Railway Company, has consented to AAR's filing of a brief.* Respondent, Thomas Ramsey, has refused consent. AAR has recently learned that respondent has waived his right to file a response to the petition and, therefore, in order to facilitate this Court's prompt review of the case, AAR is filing its motion and brief early.

AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak.

* The letter expressing consent has been filed with the Clerk of the Court.

AAR seeks leave to file a brief *amicus curiae* only when the case presents an issue of great significance to the railroad industry as a whole—and in those instances such requests have been granted.**

This case, arising under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§51-60, a federal negligence statute that takes the place of workers' compensation in the railroad industry, presents such an issue. When AAR participates as *amicus curiae* in a FELA case like this one, it brings a broad, industry-wide perspective to the issue before the court. AAR works closely with its member railroads on a host of issues arising under FELA. AAR also maintains a close liaison with the National Association of Railroad Trial Counsel, an organization of over 900 attorneys representing railroads nationwide in personal injury litigation. In addition, AAR conducts an annual survey of the FELA experience of its member railroads, and compiles and maintains the results. This represents, to AAR's knowledge, the most comprehensive database on FELA costs and trends in existence. Thus, AAR is thoroughly familiar with the trends and key issues that confront its members in FELA litigation.

Because FELA litigation is an ongoing event for all major railroads–several thousand FELA suits are filed each year–AAR has a strong interest in assuring that lower courts do not improperly expand railroad liability beyond FELA's intent. While an employer's obligations under FELA differ from, and in some ways are more substantial than, the obligations imposed on other employers, lower courts sometimes fail to acknowledge the principles that inform and limit FELA liability. Moreover, this problem is compounded by FELA's

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** *E.g., Consolidated Rail Corp. v. Richards*, 124 S.Ct. 961 (2003); *National Railroad Passenger Corp. v. Griesser*, 534 U.S. 970 (2001); *Kansas City Southern Ry. Co. v. Giddens*, 532 U.S. 990 (2001); *Metro-North Commuter R.R. v. Buckley*, 519 U.S. 958 (1996). All granting motion of AAR to participate as *amicus curiae*.

liberal venue provision, which affords plaintiffs wide latitude in selecting the site of litigation, as well as the ability to bring and maintain an action in state court. Thus, aberrant state court decisions can have a far reaching impact. So long as Congress continues to keep this régime in place, railroads will avail themselves of their legal rights in an effort to limit their liability, and AAR will support those efforts.

As a trade association representing the nation's major railroads, AAR can play a valuable role in bringing the railroad industry's perspective to the Court's attention. In this case, the lower court, in a ruling that plainly is inconsistent with this Court's decision in *Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490 (1980), has greatly increased railroad liability under FELA. This decision will impact a significant portion of the railroad industry, not just the individual railroad involved. Thus, AAR has an interest not only in assisting the petitioner in obtaining relief from an erroneous decision, but also in assuring that an important federal law is not misconstrued to the detriment of railroads in the future.

For these reasons, leave to file the attached *amicus curiae* brief should be granted.

Respectfully submitted,

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BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 78 per cent of the rail industry's line haul mileage, produce 94 per cent of its freight revenues, and employ 92 percent of rail employees. AAR represents its members in proceedings before Congress, the courts and administrative agencies in matters of common interest.

[1] No person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

One such matter is the Federal Employers' Liability Act (FELA), 45 U.S.C. §51-60, a tort-based law which provides compensation to railroad employees injured in the course of their employment. In 1908, Congress enacted FELA to provide a progressive remedy to railroad workers who, at the time, suffered a high rate of on-the-job injuries. *See* Interstate Commerce Commission, *Statistics of Railways in the United States 1908* (1909). Nearly a century later, despite the tort system having been long ago discarded as the means of compensating employees for workplace injuries,[2] FELA remains intact and results in a significant amount of litigation between railroads and their employees. Railroads spend substantial sums of money every year defending lawsuits in state and federal courts throughout the nation, and in payment of FELA settlements and judgments. Thus, precedents established in individual FELA cases are of interest to all railroads operating in the United States, particularly since the large railroads may be subject to suit in numerous jurisdiction.[3] Therefore, AAR has a long-standing history of working with its member railroads to develop legal precedent under FELA by, among other things, filing *amicus curiae* briefs in cases that raise issues of importance to the industry as a whole.

In addition to the impact of the decision below on the calculation of damages under FELA–itself an important issue

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[2] Subsequent to FELA's enactment every state enacted a workers' compensation law, under which concepts of negligence have been eliminated and insurance type benefits are provided to injured workers. *See* Price V. Fishback & Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States, 1900-1930*, 41 J.L & ECON. 305 (1998). However, both railroad employees and seamen, by virtue of 46 App. U.S.C. §688, have a negligence-based remedy against their employer for work-related injuries.

[3] The four largest railroads, all members of AAR, each operate in more than twenty states. They are subject to FELA suits wherever they are doing business. 45 U.S.C. §56.

for the railroads–AAR has an interest in this case because it raises issues concerning the nature of the taxes that are levied as part of the railroad retirement system. Unlike most American workers who are covered by Social Security, railroads and their employees are covered by the Railroad Retirement Act of 1974 (RRA), 45 U.S.C. §§231-231u. The RRA establishes a system which provides retirement, disability, survivor and other benefits designed exclusively for the railroad industry, which are funded through the Railroad Retirement Tax Act, 26 U.S.C. §§3201-3241, and administered by the Railroad Retirement Board (RRB). Billions of dollars in benefits are paid to beneficiaries by the RRB each year.

Because of the magnitude of the program and its importance to both rail employers and employees, historically AAR has been actively involved in railroad retirement issues, representing its members before Congress and the RRB. AAR has developed a solid working relationship with the RRB (as have rail labor organizations), and has served on committees and task forces that have been formed to develop and offer recommendations to the RRB. A recent outcome of such an effort was the RRB's adoption, in toto, of recommendations modifying the RRB's disability regulations offered by AAR and representatives of rail labor. AAR also played a key role in the recent significant amendments to the RRA which, among other things, adjusted both the taxes paid into the system and the eligibility criteria for the receipt of benefits. Railroad Retirement and Survivors' Improvement Act of 2001, Pub. L. 107-90.

By excluding evidence demonstrating that respondent's future income would have been reduced by the deduction of railroad retirement taxes from his paycheck, the court below opened the door to FELA awards that far exceed the plaintiffs' actual losses, which many FELA plaintiffs will continue to pursue in jurisdictions that follow such a rule. This ruling will substantially increase the already high

damages paid by AAR member railroads under FELA and unjustly impose damages on railroads that have not actually been incurred by the plaintiff. Therefore, AAR and its members have a strong interest in this case.

STATEMENT OF THE CASE

Amicus adopts the statement of the case in the Petition.

SUMMARY OF THE ARGUMENT

The ruling below, precluding petitioner from introducing evidence to show the amount of railroad retirement taxes that would have been deducted from respondent's future wages, is inconsistent with this Court's holding in *Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490 (1980), and its underlying principle that a FELA plaintiff is entitled to recover damages for only the loss of wages that actually would have been received. This issue, which is the subject of conflicting rulings by lower courts, and which can have a significant impact on FELA damages, arises with great frequency in FELA litigation, and demands a uniform rule. The absence of a uniform rule on this important issue invites forum shopping by FELA plaintiffs.

The shorthand approach to calculation of FELA damages utilized by the lower court evinced a misunderstanding of the railroad retirement system and will serve to overcompensate many FELA plaintiffs. This overcompensation is exacerbated by the ability of respondent, and numerous other FELA plaintiffs, to conceal from the jury the fact that they are collecting a substantial disability benefit.

In addition to expanding railroad liability, the ruling below will hinder efforts to rehabilitate injured railroad employees. Allowing FELA plaintiffs to collect more money while they are off of work due to an injury than they would receive on the job will create an additional incentive for injured railroad employees to avoid rehabilitation and prompt return to employment.

ARGUMENT

I. THIS COURT SHOULD REVIEW THE ERRONEOUS RULING OF THE COURT BELOW ON AN IMPORTANT ISSUE RELATED TO THE PROPER MEASURE OF DAMAGES UNDER FELA

Simply put, the ruling below interpreted FELA as affording rail employees suffering a workplace injury an opportunity to collect more money while disabled than they would earn back on the job. Not only is this contrary to the teaching of this Court in *Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490 (1980), it is inconsistent with sound compensation policy. Since the issue presented by the petition is potentially relevant in virtually every FELA case in which the plaintiff seeks damages for lost wages, a uniform rule is essential.

A. This Court's Precedents Call For a Uniform Rule Limiting Wage Loss Damages To The Plaintiff's Actual Out Of Pocket Losses

FELA is a unique compensation law in that it permits claimants to collect from their employer uncapped compensatory damages for both economic and noneconomic losses suffered.[4] Nonetheless, it clearly is not the purpose of the statute to make injured employees more than whole. Rather, with regard to wages lost as a result of a job-related injury, it is the intent of FELA that employees receive compensation for the actual pecuniary loss suffered. *Michigan Cent. R.R. Co. v. Vreeland*, 227 U.S. 59 (1913). Adhering to that principle, this Court ruled in *Liepelt* that a

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[4] *See Marchica v. Long Island R.R.*., 31 F.3d 1197, 1207 (2nd Cir. 1994); *Williams v. Missouri Pac. R.R.*, 11 F.3d 132, 135 (10th Cir. 1993). Other American workers, who are covered by state or federal workers' compensation laws, have a far more circumscribed ability to collect compensation against their employers for work-related injuries. See Part II.

FELA defendant is entitled to present evidence of the income taxes payable on the plaintiff's past and future income, and to have the jury instructed that any damages awarded the plaintiff are not subject to taxes. This assists the jury in determining accurately the plaintiff's actual pecuniary loss when awarding damages for past and future lost wages. As this Court noted, "[i]t is his after tax income, rather than his gross income before taxes, that provides the only realistic measure of his ability to support his family." 444 U.S. at 493. Subsequently, in *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983), this Court reconfirmed that damages may be awarded only for loses that actually would be suffered as a result of the defendant's tortious conduct. (Damages should be based on "after-tax wages and benefits" and should not include costs "the injured worker will [no longer] incur." *Id.* at 534.)

Like all wage earners, in addition to paying income taxes, rail employees' earnings are subject to payroll taxes which are imposed as part of a system of federally-mandated benefits. Two distinct payroll taxes, known as Tier I and Tier II, are withheld from the paycheck of every railroad worker to fund benefits available under the RRA. The Tier I payroll tax is the same as the FICA tax under Social Security: earnings are taxed at a rate of 7.65 percent, with 6.2 percent for retirement benefits and 1.45 percent for Medicare hospital insurance. 26 U.S.C. §3201(a) and §3101(a) &(b).[5] Employees also pay 4.9 percent of their earnings in Tier II payroll taxes, which fund benefits that are over and above those available to Social Security recipients. 26 U.S.C. §3201(b).[6]

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[5] The retirement portion of Tier I is levied on earnings up to $87,900 in 2004; there is no earnings cap for the Medicare portion. U.S. Railroad Retirement Board Office of Program, Program Letter No. 2004-01 (Nov. 25, 2003) ("Program Letter").

[6] Tier II taxes are paid on earnings up to $65,100 in 2004. Program Letter. Under the 2001 legislation, after 2003, under certain circumstances

Though they are the largest single source of funding of railroad retirement benefits, the payroll taxes account for just under half of the financing of the railroad retirement system.[7] Other sources of financing are financial interchange transfers with the Social Security Trust Fund, investment income, federal income taxes on benefits, and general appropriations.[8]

The principle underlying *Liepelt* and *Jones & Laughlin*—that a plaintiff is not entitled to be made better off than he would have been if the work-related injury had not occurred[9]—requires treating railroad retirement payroll taxes in the same manner as income taxes for the purpose of calculating FELA damages. As with income taxes, the money paid in railroad retirement taxes is not available to rail workers to support themselves and their families, and thus serves to reduce the actual loss suffered when an employee can no longer earn a wage due to an injury. Therefore, failing

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the rate of Tier II taxes levied on employee earnings can drop below 4.9 percent. 26 U.S.C. §3201(b)(2)(B).

[7] U.S. Railroad Retirement Board, 2003 Annual Report 9 (2003). ("RRB Annual Report")

[8] *Id.* at 9-12.

[9] Lower courts adhere to this principle in assessing damages under FELA, requiring that damages may be recovered only for losses that would actually be suffered as a result of the defendant's negligence. For example, if a FELA plaintiff suffers an independent post-accident condition, which of itself renders the plaintiff disabled from working, the plaintiff cannot collect damages from the railroad defendant for lost wages occurring subsequent to that time. *Harris v. Ill. Cent. R.R.*, 58 F.3d 1140 (6th Cir. 1995); *Stevens v. Bangor & Aroostook R.R.*, 97 F.3d 594 (1st Cir. 1996). *See also Hamm v. Consolidated Rail Corp.*, 582 F.Supp. 906, 909 (E.D. Pa. 1983) (Since the plaintiff's job "was furloughed or abolished" right after his injury, even if the defendant's negligence had disabled the plaintiff during that time, a "de minimus" award for wage loss was appropriate.)

to take railroad retirement taxes into consideration when awarding compensation results in a windfall for the employee just as does failing to take income taxes into consideration.

Moreover, unlike income taxes, which vary with each employee's individual circumstances, the amount of railroad retirement taxes to be paid by each worker is fixed, and therefore easily ascertainable. Railroad retirement taxes are not affected by the number of dependents, deductions or credits available to the taxpayer, factors which can have a significant impact on the amount of income taxes that are owed. Thus, allowing introduction of evidence of railroad retirement taxes is a straightforward matter, and is less likely to result in "protracted expert testimony and debate" which the *Liepelt* Court recognized as a concern with income taxes. 444 U.S. at 494. In addition, because there is no equivalent to the Tier II tax under the Social Security system, total deductions for railroad retirement taxes from the wages of rail employees serve to reduce take home pay by a greater amount than do FICA taxes in the case of non-rail employees.[10]

There is absolutely no public policy reason why the principle applied by this Court in *Liepelt* with regard to income taxes should not apply with equal force to taxes paid to support the railroad retirement system. Nonetheless, as petitioner points out, there is a split among lower courts on this issues, with some faithfully applying *Liepelt* to railroad retirement taxes, some refusing to do so, and some holding that evidence of railroad retirement taxes may be excluded under certain circumstances. (See cases cited in Pet. at 13-14). Significantly, the reported cases explicitly addressing

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[10] Courts have held that evidence of the payment of Social Security payroll taxes, which are of the same character as railroad retirement taxes, may be presented to the jury. *Madore v. Ingram Tank Ships*, 732 F.2d 475, 479 (5th. Cir. 1984); *Tallentire v. Offshore Logistics, Inc.*, 754 F.2d 1274, 1287 (5th Cir. 1985).

this issue represent just the tip of the iceberg, since the issue must be addressed by the parties in every FELA case involving a significant injury.

During the past ten years an average of 5,850 FELA lawsuits were filed annually.[11] While in many cases the employee returned to work promptly, numerous FELA plaintiffs claimed substantial wage loss as a result of their injuries. A significant number of FELA plaintiffs allege that they are permanently disabled from returning to the workforce, and therefore seek to recover wage loss compensation covering the remainder of their work lives.[12] An employee earning wages at the average annual level of compensation in the railroad industry would have nearly $7,500 in railroad retirement taxes deducted from his or her paycheck each year.[13]

Given the stakes, litigation over the role of railroad retirement payroll taxes in the calculation of FELA damages is commonplace. Typically, railroads respond to attempts by plaintiffs' experts to inflate damage calculations by including railroad retirement taxes in the calculation of lost wages by filing motions in *limine*.[14] Legal wrangling over this issue

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[11] Data on FELA litigation is provided to AAR in response to an annual survey of AAR member and other railroads.

[12] Of about 10,000 FELA cases closed by four major railroads in 1994, the employee did not return to the job in about 1,300 cases. *See* GENERAL ACCOUNTING OFFICE, FEDERAL EMPLOYERS' LIABILITY ACT: ISSUES ASSOCIATED WITH CHANGING HOW RAILROAD WORK-RELATED INJURIES ARE COMPENSATED 54, n.4 (August, 1996). ("GAO FELA Report").

[13] The average annual compensation of Class I rail employees in 2002 was $59,650. Association of American Railroads, Railroad Facts 56 (2003 ed.). Class I railroads, which primarily constitute AAR membership, are those with annual revenues of $250 million or more. 49 C.F.R. Pt. 1201, 1-1(a) (2003).

[14] Counsel who represent AAR members in FELA cases have advised AAR that this practice occurs with regularity. *E.g.*, *Butcher v. Soo Line R.R. Co.*, No. TH 00-83-C-H/M (S.D. Ind. 2001)(Order on Defendant's Motion in *Limine*); *Williamson v. CSX Transp., Inc.*, No. 02-04834 CA

consumes the time and resources of the parties and the courts. Judges must be educated on the nature of railroad retirement taxes and the railroad retirement system. Thus, the issue presented by the petition is one which recurs with regularity, consuming judicial resources and, as petitioner points out, resulting in varying outcomes.

The current lack of uniformity on this issue also creates an incentive for forum shopping, a practice which is facilitated by FELA's liberal venue provision. FELA suits can be brought in state or federal court in any district where the railroad is doing business. 45 U.S.C. §56. As a result, a large number of suits may be filed in a single jurisdiction, despite little connection between the facts and circumstances of the underlying cases and the forum state.[15] Moreover, even though FELA is a federal statute, plaintiffs can ensure that their suits will be heard in state court if deemed advantageous. While there is concurrent jurisdiction between state and federal court, if the plaintiff chooses state court as the forum, the case cannot be removed. 28 U.S.C. §1445(a).

Not only does the combination of FELA's broad venue provision and prohibition on removal allow plaintiffs to choose from a wide range of forums, once a case is filed, it is relatively easy to keep it in the selected forum, as *forum non conveniens* motions typically are unavailing in many jurisdictions. Sixteen railroads do business in Missouri, the state where this case arose, including the four largest U.S. railroads. St. Louis is a jurisdiction perceived to be favorable for plaintiffs, and, as a result, attracts numerous FELA

(Cir. Ct. Fla. 2004) (Order on Defendant's Motion to Strike and Motion in *Limine*).(Copies of these orders are lodged with the Court by *Amicus*.)

[15] Some courts have held that FELA's venue provision justifies affording great flexibility to plaintiffs in selecting a forum, even beyond what might be appropriate for plaintiffs in general. *See Ford v. Burlington Northern R.R.*, 819 P.2d 169, 173-74 (Mont. 1991).

lawsuits. To keep FELA cases in St. Louis, a St. Louis doctor often is retained to "treat" the plaintiff. This will usually be enough to defeat a *forum non conveniens* motion even if the plaintiff neither lives nor was allegedly injured in Missouri.[16] Since a number of state courts have ruled similarly to the court below, plaintiffs will have ample opportunity to seek out jurisdictions that hold out the prospect of wage loss awards that exceed their prior take home pay.

This could be avoided through establishment of a clear rule on the proper role of railroad retirement taxes in the calculation of damages that all federal and state courts hearing FELA cases would apply in a uniform manner. *See New York Cent. R.R. v. Winfield*, 244 U.S. 147, 150 (1917) (FELA "create[s] uniformity throughout the Union, and the legal status of such employer's liability for personal injuries, instead of being subject to numerous rules, will be fixed by one rule in all states."); *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359 (1952). Until this Court issues such a ruling, the ruling below will serve as a further incentive for forum shopping and wasteful litigation.

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[16] *E.g., Jacobs v. Union Pacific R.R.*, No. 002-07409 (Twenty-Second Judicial Circuit Court, St. Louis, Mo.)(Plaintiff resides and alleges injury in Illinois); *Branham v. Norfolk Southern Ry. Co.*, No. 002-06966 (Twenty-Second Judicial Circuit Court, St. Louis, Mo.) (plaintiff resides in Illinois, alleges injury in Indiana) ; *Pasley v. Union Pacific R.R.*, No. 002-06931 (Twenty-Second Judicial Circuit Court, St. Louis, Mo.) (plaintiff resides and alleges injury in Arkansas); *Lennie v. Union Pacific R.R.* No. 002-07896 (Twenty-Second Judicial Circuit Court, St. Louis, Mo.)(Plaintiff resides and alleges injury in Iowa). In all cases, the railroads' *forum non conveniens* motion was denied in March 2001, with the plaintiffs' receipt of medical treatment in St. Louis cited as a factor. (Copies of these orders were lodged with the Court by *Amicus* in *Norfolk & W. Ry. Co. v. Dye, cert. denied*, 533 U.S. 950 (2001).)

B. It Was Improper For The Lower Court To Assume That A FELA Plaintiff's Failure To Seek Recovery For The Potential Reduction Of Retirement Benefits Offsets The Taxes That Would Have Been Paid Out Of Future Wages

Faced squarely with the *Liepelt* decision, the court below (as have some other courts) made an effort to distinguish railroad retirement taxes from income taxes.[17] The court held that since respondent did not seek to recover for the reduction of his retirement benefits resulting from his inability to return to work and the consequent cessation of payment of railroad retirement taxes on his behalf, there was no need to reduce his wage loss by the amount he would have paid in railroad retirement taxes. This reasoning evinces a misunderstanding of the nature of railroad retirement taxes and railroad retirement benefits, suggesting that the amount the employee does not pay in railroad retirement taxes because he is no longer able to work is equivalent to the amount by which his benefits will be reduced upon retirement.[18] However, such a linear correlation between taxes paid and benefits received does not exist.

The amount payable to a beneficiary as a railroad retirement annuity is dependent on a number of factors, primarily the number of years of service, the age of the beneficiary when he or she retires, and the beneficiary's taxable railroad compensation, with the formula placing greater weight on the lower increments of earnings. Beneficiaries who choose to

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[17] The court below based its holding primarily on the decision in *Maylie v. National R.R. Passenger Corp.*, 791 F.Supp. 477 (E.D. Pa. 1992).

[18] One court mistakenly explained that "[t]he taxes paid by plaintiff into the railroad retirement fund are to fund his future retirement and are paid directly to him upon his retirement. Since the railroad retirement taxes would ultimately be paid directly to plaintiff upon retirement, we find no error with the trial court's exclusion of this evidence . . ." *CSX Transp., Inc. v. Levant*, 410 S.E.2d 299, 303 (Ga. App. 1991).

retire before the age that the RRA considers their "normal retirement age" receive benefits that are reduced in accordance with a formula. Tier I benefits, for the most part, are calculated like Social Security benefits and take into account the number of years of service both in the railroad industry and with a Social Security employer. Thus, the impact of having a railroad career cut short due to a disability on the size of the annuity received at retirement age is determined by the particular circumstances of the individual. As this Court has recognized, there is not necessarily a direct correlation between the amount of taxes paid and the amount of benefits received. *Hisquierdo v.Hisquierdo*, 439 U.S. 572, 574-75 (1979); *See also Adams v. Burlington Northern R.R.*, 865 S.W.2d 748 (Mo. App. 1993) ("Any link between the taxes paid and the benefits is too tenuous to provide a true measure of plaintiffs loss." *Id.* at 751).

The fact that in an individual case the plaintiff chooses not to seek compensation for the value of future lost benefits neither negates this Court's conclusion in *Hisquierdo* nor abrogates the principle enunciated in *Liepelt;* nor does it excuse trial courts from requiring that plaintiffs only recover for net wage loss. Depending on the circumstances, the amount that would have been paid in taxes by the employee may far exceed the value of lost retirement benefits resulting from the employee leaving the railroad workforce prior to normal retirement age due to an injury. Thus, a plaintiff might choose to forego seeking recovery of any lost retirement benefits if that creates the opportunity to recover a far greater amount representing the railroad retirement taxes that would have been paid. Courts should not countenance this approach to litigation. Rather, it is far more consistent with the compensatory nature of FELA to provide the jury with complete and accurate evidence of the plaintiff's net wages. With the plaintiff free to present properly calculated evidence

of lost future benefits, if any, the jury can then properly calculate the actual loss suffered. *See Rachel v. Consolidated Rail Corp.*, 891 F.Supp. 428, 430 (N.D. Ohio 1995). This Court has insisted that damages under a federal statute be calculated with reasonable accuracy, to the extent possible, and that courts should not utilize artificial shortcuts where relevant evidence is reasonably available.[19]

C. The Overcompensation Permitted By The Court Below Is Exacerbated In This And Numerous Other FELA Cases Since The Plaintiff Can Collect A Substantial Disability Benefit About Which The Jury May Not Be Informed

In addition to being permitted to seek recovery of the approximately $6,000 he paid annually in railroad retirement taxes as lost income, respondent also collects a sizeable annuity from the RRB. In reliance on this Court's decision in *Eichel v. N.Y. Cent. R.R.*, 375 U.S. 253 (1963), the lower court prohibited petitioner from informing the jury that respondent was collecting about $24,000 annually in railroad retirement occupational disability benefits. [See Pet. at 9a-11a] Not only did this enhance respondent's windfall, it undercuts the lower court's rationale.

In addition to retirement benefits, the railroad retirement taxes respondent and his employer pay also fund disability annuities, available to disabled rail employees who qualify on the basis of age and/or years of service. 45 U.S.C. §231a. Depending on the nature of the disability suffered, rail

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[19] In *Jones & Laughlin*, this Court rejected automatic application of a rule that presumed that future inflation and the discount rate would be equal and cancel one another. Rather than automatically permitting calculation of damages on a premise that might not be valid, lower courts were instructed that they need to make a deliberate choice based on an evaluation of the relevant factors. 462 U.S. at 552-53.

employees may qualify for one of two kinds of disability benefits. Employees who are unable to work at any regular employment may qualify for total and permanent disability benefits. 45 U.S.C. §231a(a)(1)(v).[20] Even if not qualified for total and permanent disability benefits, employees who are disabled from working in their regular occupation on the railroad may qualify for an occupational disability benefit. 45 U.S.C. §231a(a)(1)(iv).[21] The permanent and total disability benefit is funded by Tier I taxes; the occupational disability benefit is funded by Tier II taxes, and has no equivalent in the Social Security system. Thus, respondent was, in fact, reaping a substantial benefit from the payment of railroad retirement taxes prior to his injury, and will continue to do so until his normal retirement age without ever paying any additional taxes into the system.

Respondent's status as a double beneficiary is not uncommon among FELA plaintiffs, as many railroad employees receive RRB disability payments. In fiscal year 2002, 5,200 disability annuities were awarded to railroad workers, of which 4,100 were for occupational disability and 1,100 for permanent and total disability benefits.[22] During that period, the average monthly occupational disability benefit awarded was $2,242; the average monthly total and permanent disability benefit awarded was $1,339.[23] As of September 30, 2002, disability annuities were being paid to about 82,000 former railroad workers.[24]

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[20] To qualify for a total and permanent disability annuity an employee must have at least ten years of service.

[21] To qualify for an occupational disability annuity an employee must have either twenty years of service, or must be 60 years old with ten years of service.

[22] RRB Annual Report at 4.

[23] *Id.* at 18.

[24] *Id.* at 19.

The availability of a significant benefit to disabled rail employees, including those disabled from a work-related accident, undercuts the notion, implicit in the decision below and in some other lower court decisions, that the putative reduction of benefits due to the inability to work until normal retirement age offsets the gains realized by failure to deduct railroad retirement taxes in calculating wage loss. In fact, like respondent, many railroad employees can qualify for substantial benefits from the RRB without having to remain in the workforce until normal retirement age. Moreover, because juries generally may not be informed of the existence of this benefit, damage awards do not take into account the fact that the RRB is already compensating the plaintiff for the very injury for which a FELA award is sought.[25] In contrast, when a recipient of a Social Security disability benefit also receives benefits under a workers' compensation statute, federal law requires that the Social Security benefits be reduced to avoid the total payments rising above a certain level. 42 U.S.C. §424a. Permitting inclusion of amounts paid in railroad retirement taxes in the calculation of lost wages just exacerbates the problem of overcompensation courts have created under FELA.[26]

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[25] This case underscores the inherent inequity of prior rulings excluding evidence of receipt of railroad retirement disability benefits by FELA plaintiffs. AAR has filed *amicus* briefs in support of two petitions for certiorari seeking this Court's review of the application of the collateral source rule to the disability benefits collected by numerous FELA plaintiff. *Giddens v. Kansas City Southern Ry. Co.*, 29 S.W.3d 813, 824 (Mo. 2000), *cert. denied*, 532 U.S. 990 (2001); *Green v. Denver & Rio Grande Western R.R.*, 59 F.3d 1029 (10th Cir.), *cert. denied*, 516 U.S. 1009 (1995). The presentation of the tax issue in a case where the plaintiff is a disability annuity beneficiary makes this a particularly compelling case for review.

[26] Based on respondent's age and income, petitioner estimates that respondent could receive over $300,000 in damages above his actual out of pocket lost income. [Pet. at 12, n.5].

II. REFUSAL TO PERMIT INTRODUCTION OF EVIDENCE REGARDING THE IMPACT OF RAILROAD RETIREMENT TAXES WILL CREATE A DISINCENTIVE FOR EMPLOYEES TO RETURN TO THE JOB

Irrespective of the impact of the Missouri court's ruling on the damages railroads must pay in FELA cases, there is another reason why this Court should review the decision below. Failure to permit jury instructions and evidence related to the effect of railroad retirement taxes on wage loss is inconsistent with the important public policy goal of rehabilitating injured workers and returning them to productive employment.

The workers' compensation systems that cover the vast majority of other American workers set limits on the amount of compensation that can be recovered for lost wages, and generally do not allow recovery for pain and suffering.[27] Workers' compensation laws limit recovery for wage loss (disability) to a percentage of the employee's weekly wages, typically two-thirds.[28] In part, this is to take into account the effect of taxes in reducing the employee's take-home pay.[29] In addition, workers' compensation statutes further limit wage-loss compensation by capping weekly benefits, a limitation that does not apply to FELA.[30]

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[27] A. Larson & L. Larson, *Larson's Workers' Compensation Law* §1.03[4] & [5] (2004 ed.)("Larson").

[28] U. S. CHAMBER OF COMMERCE, 2004 ANALYSIS OF WORKERS' COMPENSATION LAWS 51-59, Chart VI (2004). ("U.S. CHAMBER")

[29] PETER M. LENCSIS, WORKERS' COMPENSATION: A REFERENCE AND GUIDE 57 (1998). As with tort awards like FELA, workers' compensation benefits are not subject to federal income tax. 26 U.S.C. §104(a)(1) & (2).

[30] *See* U.S. CHAMBER at Chart VI.

One reason workers' compensation systems establish limits on wage loss benefits is the widely accepted view that if compensation matches, exceeds, or even approaches, the employee's entire wage loss there will be little incentive to seek rehabilitation and to return to work promptly.[31] As the leading treatise explains "Practically all acts [] set a maximum in terms of dollars per week. . . . It was never intended that compensation payments [under workers' compensation] should equal actual loss, if for no other reason than that such a scale would encourage malingering." Larson at §1.03[5]. Moreover, rehabilitation is becoming an increasingly important part of workers' compensation programs. *Id.* at chapter 95. In some cases, workers' compensation benefits may be suspended when the employee refuses to cooperate with rehabilitation efforts. *Id.* at §95.04; Lencsis at 56.

On the other hand, although plaintiffs have a duty to mitigate damages, *Jones v. Consolidated Rail Corp.*, 800 F.2d 590, 593 (6th Cir. 1986); *Trejo v. Denver & Rio Grande W. R.R.*, 568 F.2d 181, 184 (10th Cir. 1977), FELA does not take into account the incentives that might be created by awarding full compensation.[32] FELA permits full recovery of wage loss, typically awarded in a lump sum and, as this case demonstrates, permits concealing from the jury receipt of an additional disability benefit. In fact, a compensatory damages

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[31] Meyers, Viscusi & Durbin, *Workers' Compensation and Injury Duration: Evidence From a Natural Experiment*, 85 AMER. ECON. REV. 322 (1995); Burton, *Disabled Workers' Compensation Programs: Providing Incentives for Rehabilitation and Reemployment*, 8 JOHN BURTON'S WORKERS' COMPENSATION MONITOR (No.4) 6 (1995) ("Most studies find that higher workers' compensation benefits lead to more workers' compensation claims and to longer duration of benefits. . . . higher benefits result in more workers missing work for longer spells of time, which may conflict with the objective of rehabilitation.").

[32] *See* GAO FELA Report at 25. *See also* Thomas E. Baker, *Why Congress Should Repeal the Federal Employers' Liability Act of 1908*, 29 HARV. J. ON LEGIS. 79, 102-03 (Winter 1992).

award under FELA will be deemed excessive only if it "shock[s the] judicial conscience." *Schneider v. National R.R. Passenger Corp.*, 987 F.2d 132, 137 (2d Cir. 1993) ($1.75 million verdict, including over $1 million in intangible damages, not excessive.); *DeBiasio v. Illinois Central R.R.*, 52 F.3d 678 (7th Cir. 1995) ($4.2 million verdict not excessive.)

The already existing disincentive for employees aggressively to pursue rehabilitation under FELA is exacerbated by the ruling below. As a result of this ruling, rail employees are in a position not merely to recover their full take home pay, but also to collect amounts that would be deducted from their paychecks had they returned to the job. This creates a perverse financial incentive for able workers to claim a disability and for injured workers to remain disabled as long as possible. In the past, this Court has not hesitated to intervene to establish the proper method of calculating damages under FELA when lower courts have taken a wrong turn,[33] and this Court is well within its province to review a decision that enables rail workers to recover compensation that substantially exceeds their take home pay by remaining off the job.

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[33] E.g., *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330 (1988)(Prejudgement interest awards not permitted under FELA); *Liepelt; Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U.S. 485 (1916) (Future damages must be reduced to present value).

CONCLUSION

On the basis of the foregoing, *amicus curiae* respectfully submits that the petition for a writ of certiorari to review the judgment of the Missouri Court of Appeals in this case be granted.

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